EXTENSIONS OF REMARKS

THE COURTS THWART THE EPA'S POWER GRAB

HON. MICHAEL G. OXLEY

OF OHIO

IN THE HOUSE OF REPRESENTATIVES

Wednesday, May 19, 1999

Mr. OXLEY. Mr. Speaker, many of us voiced serious concern when the U.S. Environmental Protection Agency approved strict new NAAQs standards affecting ozone and particulate matter levels. We warned that EPA was not basing the standards on good science, and indeed questioned whether the agency was running amok. This issue was of particular importance in my home state of Ohio, which faced billions of dollars in compliance costs with little prospect of any real benefit to human health and the environment. In a vindication, these rules have now been overturned by an appeals court. I commend the following Wall Street Journal article to the attention of my colleagues.

THE COURTS THWART THE EPA'S POWER GRAB

(By C. Boyden Gray and Alan Charles Raul)

Last week a three-judge panel of the U.S. Court of Appeals for the District of Columbia threw out the Environmental Protection Agency's sweeping ozone and particulate-matter rules. Citing a doctrine known as ''nondelegation,'' the judges held that the EPA was exercising too much power, effectively making rather than enforcing the law. The decision could have far-reaching implications for all government rulemaking, but it should not have come as a shock. The EPA's usurpation of legislative power has provoked significant controversy in recent years, and the only surprise is how long it took for the courts to bring it under control.

Contrary to much prevailing opinion among both journalists and lawyers, the nondelegation doctrine is not some arcane, obscure and benighted legal relic of the pre-New Deal era. The doctrine has been alive and well, serving primarily as a canon of judicial construction to save otherwise overly broad statutory grants or agency claims of legislative authority from being held unconstitutional.

The most important regulatory example of the doctrine's use was in the Supreme Court's 1980 decision Industrial Union Department v. American Petroleum Institute, which involved the Occupational Safety and Health Administration's regulation of benzene. The court was faced with a claim that OSHA has untrammeled discretion to choose any regulatory policy in the spectrum between not regulating at all and imposing rules so stringent that they take an industry to the brink of economic ruin. The justices used the nondelegation doctrine essentially to rewrite the statute, limiting OSHA to regulation of ''significant'' risks. A decade later, the D.C. Circuit, in the so-called ''lock-out, tag-out'' decisions written by Judge Stephen Williams (who wrote last week's EPA decision as well), invoked the doctrine and the benzene decision to place additional limits on OSHA.

An accident of timing allowed the EPA to escape these constraints for nearly two decades and retain its license to choose between doing nothing at all and shutting down an industry. The governing case (Lead Industries Association v. EPA) gave the EPA this broad power because it was issued by the D.C. Circuit five days before the Supreme Court's benzene decision, and thus was unaffected by the latter ruling. But it was only a matter of time before the EPA's power would collide with the Supreme Court's limitations.

For those subject to the EPA's unchecked authority, the day of reckoning came none too soon. EPA issued these rules in July 1997 despite:

Its science advisory board's admonition that the new ozone rule did not deal with any new significant risk not already addressed by the rule it replaced.

The board's inability to identify any proper level of fine particulate matter to regulate.

Universal recognition that extensive research was necessary to develop any implementing regulations for particulate matter.

Unrebutted evidence that the ozone rule could cause more public health harm than good.

Unconstrained by any coherent principle, the rules were the ultimate example of legislative horse trading. The EPA declared that in order to defuse some political opposition, it was going to exempt or favor its political allies, such as farmers, certain small business, and that section of the country (the Northeast) that provided political support for the rules. ''The new rules do not reflect the inescapable result of the available science, but simply the judgment of a political appointee,'' said Rep. John Dingell (D., Mich.), one of the principal architects of the Clean Air Act.

The D.C. Circuit's decision to overturn these rules is not inherently antienvironmental. It leaves the EPA with considerable power to decide how much environmental protection the country needs. The court simply said the EPA is not omnipotent. Its power must be limited by ''intelligible principles'' that Congress incorporated into the Clean Air Act. The representatives who face the voters' music must call the agency's tune.

This decision does nothing to impair the EPA's implementation of Congress's explicit directives in the 1990 amendments to the Clean Air Act, such as its recent auto and gasoline rules. The real question is whether future policy will be set by Congress or the unelected managers of the EPA. At present, EPA has presented no reason for going beyond the provisions of the 1990 Clean Air Act Amendments, which the agency has not yet fully implemented. EPA's backdoor efforts to regulate green-house gases will also come in for closer constitutional scrutiny. Without express congressional authorization to address ''global warming,'' the agency should not be deciding for itself how to do so.

The dissenting opinion in the D.C. Circuit decision closed with the observation that if the states had difficulty implementing the new EPA standards, they could go back to Congress and ask for repeal. But this formulation turns the Constitution on its head. It's not Congress's job to review EPA initiatives, but rather the EPA's job to carry out congressional initiatives. And it's the courts' role to keep the other players honest.

CONGRATULATING THE MEN'S VOLLEYBALL TEAM OF BYU

HON. CHRIS CANNON

OF UTAH

IN THE HOUSE OF REPRESENTATIVES

Wednesday, May 19, 1999

Mr. CANNON. Mr. Speaker, on May 8, 1999 in Los Angeles, Brigham Young University won its first-ever NCAA men's volleyball title in their first-ever NCAA Tournament appearance. They finished the season with a record of 30–1, suffering their only loss to Long Beach State whom they beat in the finals. Joining Penn State, BYU became the second non-California team to win the Championship.

BYU men's volleyball program began NCAA competition in 1990, headed by current coach Carl McGown. Initially struggling through some difficult seasons, they quickly rose to ardently compete with traditionally strong California teams. They deftly handled big name schools like UCLA, USC, Pepperdine, and UCSB.

I congratulate the fine athletes, coaches, and trainers who comprise the BYU men's volleyball program. Their dedication, endurance, and commitment are examples to all who seek lofty, worthwhile goals.

CONGRATULATIONS TO THE MUSIC DEPARTMENT OF OTTAWA TOWNSHIP HIGH SCHOOL

HON. JERRY WELLER

OF ILLINOIS

IN THE HOUSE OF REPRESENTATIVES

Wednesday, May 19, 1999

Mr. WELLER. Mr. Speaker, I rise today to offer congratulations to the Music Department of Ottawa Township High School of Ottawa, IL, for the remarkable achievement of winning the Illinois State Championship in Music competition for the third consecutive year.

For nearly the past two decades, the Ottawa Township High School Music Department has dominated the Illinois High School Association music competition by finishing in the top three places fourteen times and never lower than ninth place. On only four occasions in the history of the music competition have schools compiled more than 1,000 points. Two of these four 1,000-plus point finishes belong to Ottawa Township High School. The Ottawa Township High School Music Department also holds the State record for most points earned in the Illinois High School Association Solo and Ensemble contest.